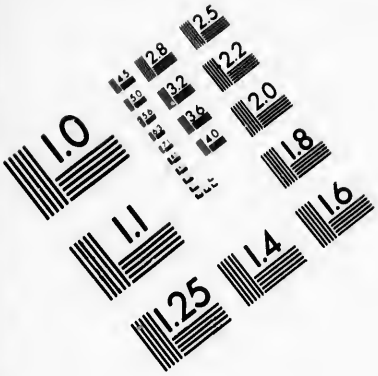

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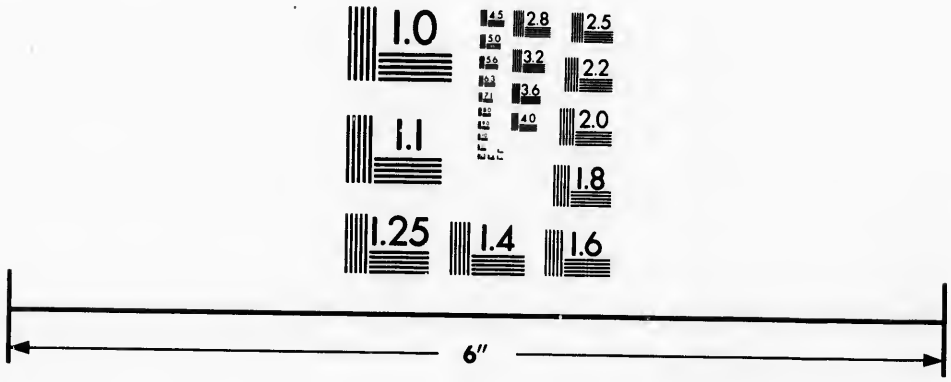

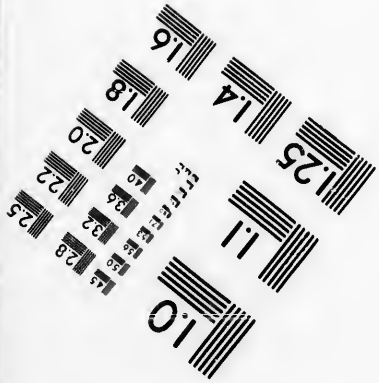

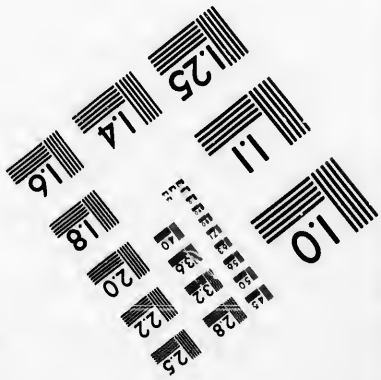

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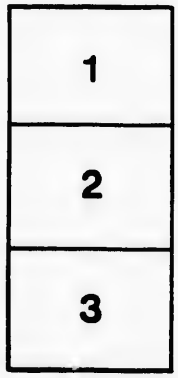

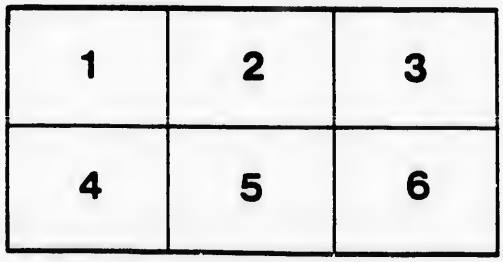

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OPINION

OF

THE HONORABLE MR. JUSTICE CARON,

AND

JUDGMENT OF THE SUPERIOR COURT,

ON

THE VALIDITY OF THE

DE LERY PATENT.

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OPINION OF THE HONORABLE MR. JUSTICE CARON.

REGINA,

vs.

DAME A. R. C. DE LERY *et al.*

On the 23rd September, 1736, the Governor at the time being of this Province and the Intendant granted to Pierre Rigaud de Vaudreuil and his representatives a seigniory of the extent of three leagues frontage by two leagues in depth on both sides of the Chaudière river, on this condition among others, " of giving notice to His " Majesty, or to Us and Our Successors, of the mines and minerals, should any be " discovered within the said limits."

On the same day the Governor and Intendant granted to Joseph Fleury de La Gorgendière a seigniory of the same extent on both sides of the Chaudière river, and on the same conditions as above.

These two concessions were subsequently confirmed by the King of France.

In virtue of an authentic deed dated 11th March, 1772, Joseph G. C. de Lery and Dame Louise Martel de Brouages, his wife, became proprietors of the said seigniory conceded to La Gorgendière.

On the 13th July, 1844, Her Majesty, by Her Letters Patent, recognised Marie Josephte Fraser, widow of the said Honorable C. E. Chaussegros de Lery, Charles Joseph Chaussegros de Lery and Alexandre René Chaussegros de Lery, as proprietors of the fief and seigniory called Rigaud, situated in New Beauce, in the parish of St. François.

In 1846 the de Lery family presented a petition to the Government of Canada, in which it was alleged that the petitioners, Charles de Lery and the other members of his family were undivided proprietors, and in possession as seigniors of the fief or seigniory called Rigaud-Vaudreuil, (that is to say of the seigniory last above mentioned.)

It was therein alleged, moreover, that in obedience to the conditions of the said concession, the petitioner declared to the Governor that there was reason to believe that gold mines existed in several parts of the said seigniory, but that he was then unable to furnish any particulars as to the nature, extent and value of the mineral.

The petitioners consequently asked for the de Lery family and their representatives, by preference, the Royal permission to open and work the said mines on paying to Her Majesty the tenth due to her according to the law of the country.

This petition was allowed, and on the 18th September, 1846, letters-patent were granted as asked for, and since that date the de Lery family have always been regarded as the owners of the gold mines in this seigniory.

Subsequently the de Lery Gold Mining Company leased from the de Lery family, for a period of 30 years, all the rights which had been conferred on them by the letters-patent of 18th September, 1846.

The Canada Gold Company, Limited, who have obtained their privileges from the de Lery Gold Mining Company, are also defendants in this cause.

Her Majesty's Attorney General for this Province asks that this patent shall be declared null.

I shall examine all the arguments advanced by the Attorney-General in his information on behalf of the nullification of the patent

It is therein first alleged that these letters-patent were obtained surreptitiously and fraudulently; in that the defendants, that is to say, the seigniors de Lery, untruly represented themselves as proprietors in possession of the soil, and that they had further declared that they had discovered the gold mines in their seigniory.

The reply to the first objection is contained in the patent itself, wherein it is formally stated that the de Lery family "have humbly represented to Us, by their "petition in that behalf, that they are seigniors and proprietors of the fief and seigniory of Rigaud-Vaudreuil."

The seigniors de Lery have alleged nothing untrue, but on the contrary have represented themselves as seigniors, and not as proprietors of the soil, the plaintiff recognizing this fact in the letters-patent in question.

Neither have the seigniors de Lery asserted that they had discovered gold, but in their petition they allege "that they have reason to believe it."

It is evident from the proof, that at the time of the issue of the patent the mines were not yet discovered, since it has required years of work and very considerable outlay to convince *merely a portion of the public*, that gold exists in sufficient quantity to justify the outlay necessary for the working of the gold mines in this locality.

But, says the Attorney-General, the seigniors de Lery, in granting concessions of lands to their *censitaires*, reserved to themselves the mining rights, and the reserve having been declared invalid by the Seigniorial Court, the letters-patent which have been granted to them should consequently be cancelled.

I ought first to observe that the concession of the seigniory in question, made on the 23rd September, 1736, and subsequently confirmed by the King of France, did not contain the right to the mines, since the sovereign specially reserves this right to himself, by binding the seignior to give him notice of all mines that he may find.

It is therefore evident that this judgment of the Seigniorial Court, which declared null the reserve of gold mines made by seigniors in this Province, cannot affect the letters-patent of 18th September, 1846, in view of the fact that the de Lery family do not base their pretensions to the property of the gold mines on the title of concession approved by the King of France, but in addressing themselves, as they have done, to the Governor of the Province of Canada to obtain these letters-patent, have, by that

act, admitted that their title of concession did not bestow on them any right to the gold mines. For this reason they rely on the letters-patent alone in support of their rights.

It is important to observe also that the Seigniorial Court did not decide that the ownership of gold mines, or rather the right to dispose of them, was not in the Crown, as this question was not submitted to it. It is also known that the Statute constituting that court gave it jurisdiction only in such case. The decision of that court has therefore no bearing on the present action.

The allegation of the plaintiff that the seigniory of Rigaud-Vaudreuil, as originally conceded, comprised the parish of St. Joseph, not that of St. François, Beauce, is strictly correct; but there was a subsequent exchange between the two seigniors, since which time the seigniory of St. François has always been known under the name of Rigaud-Vaudreuil. The admissions filed, as well as the register of the property, establish the identity of territory and leave no doubt on this point. They read as follows:

" The Seigniory Rigaud-Vaudreuil has always been known and designated by " this name since the deed of Exchange of the 5th January, 1747, between Pierre " Rigaud de Vaudreuil and Joseph Fleury de LaGorgendière, and is situated in and " comprises within its bounds all the parish of St. François, Beauce, and is the same " as that mentioned in the plea of the defendant, the DeLery Company, as having " been conceded to the said Sieur Fleury de LaGorgendière on the 23rd September, " 1736, and the said Dame Marie Josephte Fraser, Charles and Alexandre DeLery " were at time of the issue of the said Letters-Patent, sole and exclusive proprietors " of the said fief and seigniory."

It must not be forgotten that the seigniors de Lery have been since the seigniorial commutation absolute proprietors of all unconceded lands in the seigniory, as admitted in Exhibit A. 1 of the de Lery Gold Mining Co.

With regard to the informalities in the issue of the Letters-Patent of 18th September, 1846, alleged by the plaintiff, I do not see that anything essential had been omitted in this regard.

The evidence of the Crown agents named under the Mining Act, and their official reports establish that the information which the defendants were bound to furnish had been always regularly supplied.

The de Lery family have not paid the royalty of ten per cent, because they have not themselves worked the mines; nor were they bound to do so until they had worked the mines and treated the ore in smelting furnaces:—the conditions in this respect of the letters-patent of 18th September, 1846, being as follows:

" And also upon condition of well and truly paying, in each and every year, *from* " *the time of melting the said ores*, for the first time in working furnaces, unto *our Re-* " *ceiver General*."

As is evident, the above condition disposes peremptorily of this argument, all the more that it has not been proved that any quantity whatever of gold ore has ever been smelted in working furnaces in this seigniory.

The plaintiff alleges further, that on the 10th May, 1866, an Order in Council changed the royalty, on condition that the de Lery Company should obtain a settlement within five years of the differences existing between the *censitaires* and proprietors concerning mining rights, and that if these difficulties were not settled within a reasonable time, the de Lery Gold Mining Company should abandon its claim to the gold on conceded land. This Order in Council was passed on petition made by the de Lery Gold Mining Company, in virtue of a resolution of that Company in the following terms: "That the officers of the Company are hereby requested to make "a formal application to the Canadian Government for *an abrogation of the royalty* "named in the de Lery patent; or at least *for a reduction of the same from ten per cent* "*to one-half of one per cent.*" And the petitioners concluded as follows:

"To sum up the whole case then, we respectfully ask that the Government shall "abrogate the royalty named in said patent, or at least reduce the amount to one "half of one per centum; and in return we are willing to waive all conditions of "said patent, which we might otherwise set up as a defence against the collection "of any royalty whatever. All of which is respectfully submitted."

While it is true that Mr. Alexandre de Lery concurred in the above petition, he cannot be held responsible for more than is contained therein, and the only thing sought for in the petition is a reduction of royalty from ten per cent to one-half per cent.

By his concurrence in this request, Mr. Alexandre de Lery clearly did not bind himself to secure a settlement of any difficulties that might exist between the *censitaires* and the owners of the gold, either by amicable settlement or by obtaining a decision of the Courts.

Besides, this order in Council cannot affect the defendants de Lery, since the de Lery Gold Mining Co. only is mentioned therein, and it is simply provided that if that Company does not settle with the *censitaires* and owners of gold on private lands, in that case the said Company shall abandon its pretensions to the ownership of the gold.

I really fail to see on what grounds the de Lery family should thereby be compelled to effect settlement of these difficulties, or why the Patent obtained by them in 1846 should be annulled, because the de Lery Gold Mining Company had not conformed to the provisions of this Order in Council.

The de Lery Gold Mining Co. even are not bound by the Order in Council, as far as concerns the obligation of settling with the owners of land and *censitaires*, seeing that the resolutions on which the petition of the Company is founded contain no provision in this respect but as the letters-patent of this Company are not in question in the present suit, this objection need not be held as serious.

It is also important to observe that the only proprietors in the Parish of St. François in the Seignory of Rigaud-Vaudreuil who appear to have contested the rights of the defendants during the long period which elapsed between the obtainment of the letters-patent by the de Lery family in 1846 and the present action, that is to say, nearly forty years, are Messrs John O'Farrell and William Venner, who

settled their suit and acknowledged the validity of the letters-patent in an authentic deed. (Exhibit K of Plaintiff.)

During all this time no other person protested against the rights granted to the defendants.

As to the pretension that the Governor of Canada, Lord Catheart, had not the power, either in virtue of his Commission or of the Statutes of the Province of Canada, to grant these letters-patent, it has clearly no foundation. The Governor represented the Queen of England in this country and possessed Her powers at least as far as concerned the administration of the public lands. The Statutes, 30 George III, cap. 3, authorizing him to grant letters-patent for uncultivated Crown lands or other public lands, why should he not have had the power to bestow merely the right to work gold mines, if this privilege really belonged to Her Majesty.

I do not consider the objection raised to the powers of the Governor in this respect is at all important. But the right which the Crown claimed in disposing of the gold mines in favor of the de Lery family by the letters-patent of 18th September, 1846, presents the gravest difficulty to be determined in the present case.

The solution of this question, as I conceive, depends altogether on a more important and really the only important one which presents itself in the present action, that is to say in what consisted the prerogative of the Kings of France, in France as well as in this country, at the time of its cession to England, in reference to gold mines. It will be readily admitted that if the Kings of France, at the time of the cession of this country, possessed the privilege of being able to grant rights of the nature of those contained in the letters-patent of 18th September, 1846, then, as a necessary consequence the Queen of England might grant the same privileges to the Seigniors de Lery.

I come then, as I have just said to the gordian knot of the present case.

This question of the authority of the Kings of France, as to the granting of rights to work gold mines, is a vast subject, embracing the greater part of the judicial history of France from the earliest period of the French monarchy down to the great revolution of 1789.

Fully to apprehend all the legislation on this subject during this long period in France, it is perhaps not unimportant to state what has been the legislation in this respect since the beginning of the Roman law.

In Rome, under the republic and the first emperors, the owner of the surface was owner alike of the mines in the soil beneath. There, the products of the mines were considered in the same light as fruits. Later, there was no longer any question as to the right vested in the proprietor of the soil to the mines which existed in his property; it was replaced by a right in favor of the State.

"The Emperor, "says M. Chevalier" claimed for himself, in his quality as head "of the State, a right superior to that of the owner of the surface,' and what follows "makes this clear; the Emperor in fact was not satisfied with establishing a tax for "the benefit of the treasury; he claimed also the power of determining the rights of "the surface proprietor, over the products of the mine, when its working had been "intrusted to a third party."

" Let us read in regard to this the 3rd constitution of the Justinian Code rendered by " Gratian, Valentinian and Theodosius, and addressed to Florus, prefect of the preto- " rium : that those who work mines situate in the property of another person shall be " bound to pay to the exchequer one-tenth of the proceeds which they obtain from the " mines by their industry, another tenth to the owner of the property in which the " said mine is found, and the other eight-tenths shall belong to those who work the " mine."

Nevertheless Merlin, in his questions of law, notwithstanding the text of the code, claims that the ownership of private individuals in mines was unquestionable in Rome under the Emperors.

" It is truly lamentable (says again M. Chevalier) to see such an assertion from " the pen of Merlin, and in fact, is there any admission of the right of the surface " proprietor to the mines? When the State not only levies a tax, but claims the power " of determining the share of the landowner himself."

" We do not think so, but, according to us, there is on the contrary a promulga- " tion of the Royal prerogative."

This opinion is also shared by Domat, Edouard Dalloz, 2nd vol., p. 2, " According " to Roman law in its last condition, says the latter author, this tax on mines has the " decided stamp of indicating the Royal prerogative."

" According to Héron de Villefosse on *mineral wealth*, vol. I, p. 6, the Royal pre- " rogative over mines implies the right which the State, represented by the Sover- " eign ruler, reserves to itself of disposing of that property underground as public " property, independent of the private ownership of the soil which conceals it, and " to dispose of it for the greatest benefit of the community."

" Denisart says that the word *régal* in its general signification means *what belongs* " *to the King in virtue of his crown.*"

" M. Migneron, in his *mining annals*, vol. III, p. 635, sums up the Royal preroga- " tive under these three privileges conferred by it on Princes :

" 1st. Of determining the allotment of this underground property, or in other " words, of granting the privilege of working it to such persons as can best develop " its value."

" 2nd. Of superintending the workings in their relation to public order, to the " preservation of the soil and the safety of the miners."

" 3rd. Of collecting a certain tax on the products of the working."

This doctrine, as I shall shew, is shared by the most part of the authors who have written on this subject, and is agreeable to natural law.

" The need of metals, (says Domat on Public Law, vol. I, chap. XXII, book II, " sec. 2, No. 19,) not only for coinage and in the manufacture of arms and artillery, but " for innumerable other needs and conveniences, of which many concern the public " interest, renders these products (*i. e.* gold and silver) and those of other metals so " useful and necessary in a State that it is public policy that the sovereign should " possess over mines and their products a right *independent of that of the owners of the* " *places where they are found ; and from another point it may be said that their right in*

" *its origin was limited to the use of their estates for sowing, planting and like similar* " *uses, and that their titles did not imply a right to mines which were undiscovered, and* " *intended by nature for the public service, from the need which a State may have of the* " *metals and other peculiar products of the mines.* Thus the laws have regulated the " use of the mines, and while leaving to the owners of the laws what seemed just, " have also assigned a right to the Sovereign therein."

As may be seen, the opinion of Dunnt, shared moreover by Henrion de Pansey in his *treatise on judicial authority in France*, ch. 25, is founded on the usefulness of mines to society.

On reference to the 8th vol of Mr. Isambert's collection of old French laws, page 386, we read as follows:

" Man by natural law becomes owner only of that which he puts in cultivation, " and causes to bear fruit; the underground property may therefore be held separate " from that of the surface." This is also the view which a distinguished writer on public law, M. Comte, enunciates in his *treatise on property.*

M. Dupont, in his practical treatise on mining law, vol. I, p. 2, expresses the same idea in other terms: " Thus, says he, whether in the original occupancy of the " land, which was the basis of landed property, or in the transactions and transfers " which followed, the possession of the mines has been, in fact and by natural law, " distinct from the ownership of the surface, and has not necessarily followed the " latter. The very nature of mines yet undiscovered has led us to establish that by " natural law the ownership of mines does not necessarily follow the surface; if we " now consider the nature of mines discovered and wrought, it will be easy to prove, " that in the interest of efficient working of these mines, and consequently in the " general interest, it is in fact fitting that the ownership of mines should be separate " from that of the soil."

After citing the opinion of Merlin, who seeks to prove the rights of the proprietors of the lands to the mines, Mr. Richard, in his treatise on Mining Legislation, adds: " Nevertheless we should find difficulty in contesting the opinion of the learned juris- " consult, whose name is an authority on every subject, above all when his opinion " seems favorable to the free working of an immense industry, if, on the one hand, " we could not invoke the not less weighty authority of authors of repute, and of " legislation itself; and, if on the other hand, the question of free working did not " seem to us absolutely distinct from the grant of the property to this or the other. " It is, moreover, a truth as unvarying as trite that the region underground, where " mineral wealth is formed, obeys natural laws essentially different from those ruling " the surface, where vegetable wealth is generated."

Mr. Dufour, in his *Practical Treatise on Mining Law*, expresses the same opinion.

" Mines," he says, " form a property distinct from the soil which covers them, " and this property can become part of the private estate only in virtue of an act of " the Sovereign, who alone has the right of disposing of it in the name of the com- " monwealth. This doctrine, although combated by some jurisconsults whom the " exclusive study of civil law has caused to distrust the most legitimate necessities of

" the public interest, has been taught by the most distinguished writers on public " law."

In the first rank may be named Mirabeau, M. DeLebecque, Mathieu, Dufour, Dupont, Dalloz, Ferrières, Chevalier, Biot, Bury, de Fooz, M. de Fresquet, and some others, whose opinion I shall cite.

It is evident that the idea that the ownership of the mines was alien to him who owned the land could only prevail after many difficulties, because, says the same author, " it clashed violently with the beliefs based on those civil laws which relate " to the ownership of the soil. It could only be established by aid of those distinc- " tions which are at once the accompaniment and sign of an advanced civilization. " In the edicts, ordinances and decrees which followed on the subject of mines, if the " owners of the surface are not regarded as masters of the mines, since the King dis- " poses of them, they are ordinarily granted a toll on the product in the form of " indemnity."

I find precisely the same doctrine in the work of M. de Fooz, entitled *Fundamental points of Mining Legislation*. " It has been admitted," he says, " among nearly all " nations that mines of this nature form part of the State demesne, that they are " ranked among the resources of the commonwealth; that the charge should be " intrusted to the sovereign authority to exercise supreme control over their extrac- " tion. In this consists the system of royal prerogative over mines; it is that most in " harmony with *the nature of things*, which is most easily reconciled with the general " principles of law, and which the public advantage approves."

From the nature of mines it is evident they may not be mixed up with surface property which may be endlessly divided, whereas the division of a mine may have the effect of destroying it. Moreover, mines have nothing in common with the configuration of the land, and the laws which govern their working have no relation to those which affect the surface.

" Considered individually, mines" (says Jousselin in his *Treatise on servitudes of public utility*) " have a conformation of their own, a form of existence adapted to " themselves, and in no way dependant on the state of the surface."

" It is sufficient " (says Comte Girardin in his report) " to see the vein containing " the mineral extending for a considerable distance in the depth of the earth, to prove " that it is not in its nature divisible, and that it includes in its uncertain and variable " course properties endlessly divided among the surface proprietors. Who, among " them, is entitled to be owner of the mineral vein ? "

There is no parallelism between the conditions that give value to the surface, and those that render a mine valuable. Men have increased the value of the land by building and cultivation, but this labour could bestow no value on a thing then undiscovered. The original occupier of the land consequently cannot pretend to have enjoyed the possession of a thing at the time not known to exist.

See in what terms M. Regnault d'Epercy, judge advocate in 1791, expresses himself:

"The source of all property springs in the beginning from a division or from "labour constantly bestowed by the first occupier for an object without any opposi- "tion. This property so acquired became transferable only by the protection of the "community : hence private individuals possess nothing but by law, and all their "rights being the result of its protection, they can enjoy nothing but in such "manner as suits the community."

M. DeLebecque, page 11, makes the following remark on this subject : "In "going back to the origin of property, and in seeking the law of nature, independant "of every other consideration, we see that in the system which appears the most "reasonable, it is development of value, in a word, usefulness which has created "property, and that thus in referring to this origin, mines could not be subject to the "ownership of the soil."

Thence is the origin of the prerogative which first prevailed in the last days of Rome, and afterwards generally among all modern nations, and especially among those of the north of Europe as to the French monarchy, the principal ordinance, which for more than a century constituted the common law of the country in mining matters, was that of 30th May, 1413, of Charles VI.

"There is in truth," says Richard, "some element of perplexity ; the text seems "to admit the right of the proprietors of the land : *to those to whom the said things,* "*shall be or belong.* But at the same time it converts this right to an indemnity : *to* "*satisfy ;* and he gives to the *discoverer* of the mine the right of working and of "*ownership : to sell to those who shall work and smelt ;* and it fixes as a condition of "this grant of property the payment of the royal tax.

"And could the King thus grant, on condition of dues or service fixed, the pro- "perty in the land, if he did not consider himself as proprietor ? He does not even "grant a preference to the land owner : "it is, *all miners or others . . . everywhere, &c.*"

Later the famous Ordinance of Louis XI of Montil-les-tours, establishes the prerogative in an explicit manner, as does also the Ordinance of 1413.

Mr Richard, commenting on the principal provisions of the first of these, concludes as follows :

"We see that in this Ordinance the Royal prerogative is as absolutely recognized "as in that of 1413, and that the exercise of it is more explicitly determined. If any "rights were admitted as belonging to the owners of the land, it certainly was not a "right of property in the mines, as the right of property was then and is still to-day "understood : one would not dream of dealing with owners in reference to their "property, as King Louis XI dealt with land owners in regard of mines situate under "their soil."

Henri II, by his Ordinance of 30th September, 1548, gives de Roberval an exclusive privilege to work the mines throughout the whole Kingdom. "The terms of "this Ordinance," says Mr. Richard again, "deserve notice as giving formal expres- "sion to the claim which up to that time had scarcely shown itself save in its results."

"And where in any place openings, vacant lands belonging to us, and water "necessary for the purpose may be found, we have allowed and do allow him to take

" in the places adjoining which shall to him seem suitable to the purpose, both lands " estates and streams, on paying a reasonable price to the owners; or the damage " which shall have been occasioned to them, *with regard to the value of the said lands " only, and not of the mines therein.*"

This leaves no further reason to doubt the formal assertion of the perogative, and that the owner of the surface had not the property in the minerals.

In the Ordinance of 10th October, 1552, of which I have just spoken, Henri II confirmed the privilege granted by the Ordinance of 1548, and allowed Sieur de Roberval to take lands and make roads everywhere, on previously paying *for the surface of the land in a reasonable manner*, as the case might require; *and that the said land owner could allege no claim to the mines nor ask other advantage than compensation for the* surface of the lands or inconveniences thereon whence the mines were extracted.

Should there yet exist any doubts as to the nature of the rights claimed at this period by the Kings of France over gold and silver mines, the following provisions of the Edict of 16th September, 1557, ought entirely to dissipate them: " We will and " intend," it is there said, " that all mines, retained and held in possession by any per- " son whatsoever *without privilege, leave and formal permission from Us*, shall be taken " and seized and placed in Our hands by the said Sieur de Roberval, who shall there " cause them to be wrought and the ore smelted and refined according to the autho- " rity which we have granted to him, he paying by himself or his deputies the miners " and laborers therein reasonably, and the said miners we mean and will not to work " nor labour under any other authority than that of the said Roberval."

Several privileges of the same nature were granted to Mr. de St. Julien, the 6th July 1561 and 1563.

Henri III on 21st October, 1574, confirmed the transfer by the same St. Julien to Antoine Vidal. On the 9th December, 1551, Henri II had granted letters-patent to the Sieur Goutre to seek for and open all kinds of mines in the Kingdom, an Ordinance of the utmost importance in the present suit, because it helps to explain that of June 1601, is the Edict of Henri IV. of Rouen, January 1597. By this Ordinance which I have found cited by only one of the many authors whom I have examined in the study of this case, Henri IV expressly confirms the Edicts of his predecessors, including therein that of Charles VI. He confirms the privileges and office of the Grand Master of the mines, and mentions the grants made to the seigneurs de Roberval and de St. Julien.

" He states " says Mr. Lamé Fleury, in his " *Legislation on Mines*, only to repel " them, the continual claims of the seigneurs to tax of one tenth, of which he claims " exclusive possession and payment by all, maintains in their favour the right to one " fortieth, and limits as before the indemnity due to the land owner to the value of " the surface, established by special officers of mines."

This last Edict of 1597 limits again, as we see, the indemnity due to the owner of the land *to the value of the surface only*, and that is precisely what Henri II had proclaimed nearly half a century before in his Ordinance of 1558. In this Ordinance Henri IV declares that the proprietor has no right to the mines which may be found

on his land; so that for nearly three centuries antecedent to this Ordinance the Kings of France had always used the prerogative either to bestow on miners generally the right of working the mines, or else to grant exclusive privileges.

I think I have shown by the Ordinances and legislative Acts which I have cited that the Kings of France had invariably exercised absolute authority in granting the right to work the mines, especially those of gold and silver, at their own good pleasure, and had even forbidden the proprietors of the land to work them without their special permission.

All the authors whom I have quoted hold the same views, and Troplong, in his "Review of Legislation and Jurisprudence," 18th vol., p. 146, sums up as follows the different phases through which this system was established in France:

He says: "Under the feudal system the mineral demesne passed into the hands "of the seigneurs, (lords of the manor.) Then when the centralisation of power had "gradually shaken or effaced these local sovereignties, mines passed from the "seigniorial and became part of the Royal demesne. *The possession thereof by the pro-*"*prietor of the surface was obliterated and rendered of no account, yielding to the prevail-*"*ing public interest.*"

I shall now endeavour, before speaking of the other Ordinances of the French Kings, to state the extent of their legislative powers, with regard to mines. These powers were absolute, especially in matters of administration, and had, in their relation to legislation, only two obstacles to encounter in their development, that is to say, the States General and the Parliaments.

Under Charles VII the Royal power was strengthened, and later Louis XI completed the instruction of the feudal authority, against whose influence the legislative authority of the Kings had no longer to contend, and France really became an absolute monarchy. It is true that the Ordinances issued by the King became obligatory only after publication and registration in the several Parliaments; but it is clear on the other hand by the declaration of the States General (1314-1356) that the concurrence of the three Estates was only necessary for the settlement of the subsidies (impôts) and for mesures relating to the general administration of the kingdom, and moreover, fom the 16th century the increasing Royal power used every means to free itself from these restraints.

The Ordinances moved by the Chancellor of the Hospital and by Richelieu destroyed nearly all the political liberties which had existed in France from the middle ages.—The Ordinance of Moulins (February, 1566) dealt the first blow; its first article decrees that "The Ordinances made by Us since our accession to the "throne .... shall be kept and observed in our Parliaments, Grand Council, "Chamber of Accounts and others, in our Courts and Halls of Justice, and by *all* our "subjects, notwithstanding remonstrances made or reserved against any of the "articles thereof, notwithstanding also that our Edicts and Ordinances may not have "been published in any of the said Courts."

Nearly a century later Cardinal Richelieu forbade the Courts of Justice and the Parliaments to take cognisance of affairs of State and of *administration*. In this

Ordinance Louis XIII proclaims that Edicts affecting the Government and State administration shall be enregistered without their taking cognisance of them *and without debate.*

"The Parliament," remarks Mr. de Fresquet, "did not dare struggle against "Richelieu, and then, as says one author, despotism was proclaimed in a country "which had always ill-understood liberty, but where slavery had never been "admitted."

And lastly, Louis XVI. in his Ordinance of 1673, decrees that his Edicts shall be enregistered at once without any modification or other clauses which may hinder their execution.

It is true that in 1715, the Regent restored to the Sovereign Courts the right of remonstrance before registration, but in 1720 the Parliament was nevertheless transferred to Pontoise, *where it was to occupy itself only in rendering justice.*

In 1753 it was again transferred, these facts proving in the most formal manner that the Kings of France, from the time of Charles VII. and especially at the date of the cession of this country to England, were absolute, exercising their legislative powers and those relating to the administration of State affairs without any real control. History is unanimous on this point.

In the exercise of this system, abuses doubtless occasionally crept in, as may happen in modern legislation, even in those communities where perfect liberty exists, but the inconveniences of this system of administration, and the injustice that occasionally arose therefrom, are not an argument to prove that the absolute monarchs of France have not always disposed of the working of gold mines according to their own good pleasure. Nor must it be forgotten that in granting these privileges they hallowed, as I think I have shown, a principle founded on natural law, and recognized in the legislation of almost every people, ancient and modern.

But it is pretended that article 187 of the *Custom of Paris*, which reads as follows: "Whoever has the territory known as the *ground floor* (rez-de-chaussée) of "any estate may possess what is above and below his land," bestowed the mines on the owners of the soil and definitively settled this question

It must be noticed that the last compiling of the Custom of Paris dates in 1580, and is consequently antecedent to the passage of the Ordinance of 1597, last above cited, which declares, in the most emphatic terms, that the only compensation due to proprietors for mines which may exist within their property shall be limited to the damage done to the surface of the soil.

Moreover the words *qui a le sol*, he who holds the soil, must be understood as referring to private, not public rights. This is the opinion of the commentator Ferrier also, in his commentaries on the article of the Coutume de Paris, page 1547. He says: "These words, *should hold above and below the soil*, refer to private rights and not to the "public rights as regards the King, who alone has the right to excavate the estates "of his subjects, to draw therefrom gold, silver and minerals; the which belong to "him to the deprivation of all other persons, according to the Ordinance of King "Charles IX, given at Paris the 6th May, 1563, to that of Henri IV, of the month of "June, 1601, and that of Louis XIII of the month of May, 1635."

I must remark here that, notwithstanding the pretensions to the contrary, I do not think that this Ordinance of 1601, and that of 1604 confirming it, effected any change in the common law relating to mines, as it existed previously in France.

It is easy to satisfy one self that Henri IV had no intention of renouncing any of the prerogatives already possessed by the Crown in this respect. It suffices, on this head, to read the preamble of this Ordinance, and also the first article of which the following are the principal provisions :

" We have called the attention of our Council to the declarations of the Kings our " predecessors, even those of Francis I, Henri II, Francis II and Charles IX, our well " beloved lords, father-in-law, brothers and others, confirmed in our Court of Parlia- " ment, in our Chamber of Accounts and Court of our Subsidies at Paris, and elsewhere " as necessary, on the subject of the mines and minerals of this kingdom, the country " and territories under our sway..... *We have confirmed and approved, and by these " presents do confirm and approve the said edicts and ordinances in every point*, in their " form and tenor, to follow them in regard to our said right to be paid fully and freely " in all the said mines."

Pothier takes this Ordinance as his authority for saying that the mines belong to the proprietor of the soil. It is clear that if this great jurisconsult had examined the ordinances of Henri II, of 1548, and 16th September, 1557, and that of Henri IV of 1597, in which the Kings of France declare in clear and precise terms that the proprietor of the soil has right to compensation only for the damages done to the surface of the soil, he would not have expressed that opinion.

It is true that Henri IV in his Ordinances of 1601 and 1604 made new regulations for the working of the mines, but by what right can it be concluded from that, that he renounced the right so often exercised by his predecessors, and proclaimed by himself in his Ordinance of 1597, as well as in his Ordinance of 1601, in which he begins by confirming the Ordinances and Edicts of the Kings, his predecessors. Now, these former ordinances could only be those of which I have spoken above, and especially those of 1548, of 10th October, 1552, and, lastly, that of January, 1597, which uniformly limited the compensation due to the proprietor of the soil to the extent of the damage occasioned to the surface.

In speaking of these Edicts of 1601 and 1604, Mr. Delebecque adds that they establish most clearly the existence of the Royal prerogative over mines in France. The King grants a monopoly to a grand master of mines, and the authority to work them can only emanate from him. If it appears that the landowners have some times a preferential right, we never find their right recognised to exact compensation as owners of the mines.

Mr. Demolombe, vol. 9, No. 647, while pretending that under the old French law the mines generally belonged to the proprietors of the soil, adds, a little further on, that to separate property in mines from the ownership of the soil, it is necessary, that the concession shall have been made according to the conditions prescribed by law.

This is precisely what the Kings of France had always done up to the French revolution : Thus in the month of July, 1705, the King makes a further grant to

Sieur de Volagré, of the gold and silver mines recently discovered at Poitou. In 1560, Francis II had made a concession of the same nature to Sieur de St. Julien. It was therein specified. "That the said grantee shall come to agreement with those to whom "the said estates belong, satisfying them respectively by mutual consent according "to the advice and valuation of experienced judges and arbitrators; *without the price "being in any way increased by reason of the use derived therefrom by reason of the said "mines*" (vol. 10, collection of old French laws.)

About 1727, special concessions were made to different persons of all the mines of Bourbonnais and Brittany. No change in the legislation relating to mines was made in France up to the cession.

"In France," says Mathieu, in his Mining Code, "up to 1791, the legislation had "never been either very formal or very regular, because the tribunals had never taken "cognizance of mining matters, which were exclusively dealt with by the Council "of the King. There the laws were modified by special decisions; credit, favour "and intrigue obtained the successive grant and revocation of the same concessions, "and the constituent assembly, when it did occupy itself with this branch of legisla- "tion, was convinced that the mines had become the prey of courtiers sporting alike "with the rights of the landowners and those of the discoverers. Nevertheless, it "was invariably held, before 1791, that mines in France formed part of the public "domain."

Denisart (verbo mines) says "that gold mines belong to our Kings, as an appanage "of the Royal domain."

D'Argentrie (Nos. 40 and 41) also includes gold mines among the property which can only belong to the King.

This right or Royal prerogative has also been recognized as the old common law of France by the Court of Cassation on the 15th May, 1833. The preamble is in these terms:

"Whereas, under the old common law of France, and whatever may have been "at certain periods, the pretensions of the highest rank of seigniors (seigneurs hants- "justiciers), *the mines were of the King's prerogative*, and their *working was subject only "to the previous permission of the King*, and not to that of the seigneurs hants- "justiciers."

But, at this epoch (1722), says M. Chevalier, at page 26 of his work, already cited: "Louis XV published an Ordinance known as that of 1722, in which he returned to "the absolute maxims of Henri II. He confirmed again the system of exclusive pri- "vilege, without compensation or right of preference to the owner of the surface. "That is the legislation which existed up to 1789. In fact," he adds, "it is easy to "see that the right of the owner of the surface, under our old monarchy, had never "been seriously entertained, and upon the whole the Royal prerogative was really "the basis of our legislation up to the French revolution."

"All our legislation," says Regnault D'Eperey, at the Constituent Assembly, "dating from the first dynasty of our Kings up to our time, represents mines as be- "longing to the Royal domain."

"A general principle, says M. Bury, is found in most of the administrations under "the old French monarchy; mines are not given up to the free and exclusive dis- "posal of the owners of the surface: they can only be wrought by permission of the "King, or the functionaries who represent him, and their working is subject to "administrative surveillance more or less organised, as also to a public tax."

It is beyond doubt, from the numerous authorities whom I have cited, that the Royal right, that is to say, the right of the Prince to grant the privilege of working the mines to the most competent, to superintend their working, and finally to receive a tenth, has at all times existed under the old French monarchy, and whatever difficulty might exist in defining the nature of the rights of the surface owner in gold mines before the cession of this country to England, it is evident that the King of France would have had the power to allow the authors of the de Lery family title to work the gold mines through the extent of their seigniory.

The King of France, in granting this seigniory, had done so only on the express condition which I have already mentioned, that the seignior should give notice to his Majesty of the mines which might subsequently be discovered.

This condition can mean nothing else than a reserve of the mines in the King's favour.

The seignior, with a clause of this nature in his title of concession, had no right to work the mines, as he was bound to give notice to the King the moment he ascertained the existence of any mine within the limits of his seigniory.

The King, in conceding lands with the reserve, consequently remained owner of the mines, or at least retained in every case the sole right to allow their being wrought. As a necessary consequence, the reserve of the mines made by the seignior in his deed of concession to his *censitaires* could have no effect.

This is what the Seigniorial Court decided, and that decision has evidently no bearing on the present suit.

We see by the letters-patent of the Kings of France, registered at Quebec, on the 6th November, 1721, that a large number of Seigniorial grants containing the reservation of the mines in precisely the same terms, was confirmed.

By referring to vol. I of documents relating to the seigniorial tenure, it is easy to convince oneself that the reserve of mines is always found in the titles of grants of seigniories by the King, except, perhaps, when he judged fit to grant this right to the seigniors, as occurs in the titles of the grants of some seigniories. It is needless to add that the mines did belong to the Kings of France, as several grants made by them leave no doubt in this respect. I shall cite two instances: first, in April, 1627, the King granted to the Company of the Cents Associés the whole of New France, with *the lands, mines*, &c., and in 1628 the same company returned all to the Crown. Another fact in support of my opinion, and one, I think, of extreme importance in this case, is the grant made in June, 1677 by the King of France to Jean Baptiste de Lagny des Brigandières. By this grant M. de Lagny obtained the privilege of opening any mines which might be found in this country and working them for his own profit for the space of 20 years. If the King of France could make this

grant without regard to the pretended rights of the owners of the surface, several seigniories having at that time been granted by him, nothing could have prevented his making a grant of the same nature some days before the cession of this country. It is true that grave objections may be raised to such a system, and that injustice might sometimes result therefrom, but these considerations can have no weight in the decision of the present case. These actions on the part of the Kings of France, the legality of which has never been called in question, lead me naturally to the conclusion, which is, moreover, the logical one, that since the King of France did actually make these grants, and especially that of M. de Lagny in 1677, the same thing could be done since the cession of this Province to England, because the authority of the King of France was not less extensive since the cession than in 1677. It must, besides, be observed that an act of this nature is an act of administration and not the exercise of legislative power.

I should also add that the grant of 18th September, 1846, is an act of administration which was done on the same conditions as the King of France imposed in similar circumstances, and in every respect in the public interest. The large sums of money which have since then been spent in this locality are one of the best proofs of this.

It does not appear, moreover, in a satisfactory way in the present case, that any one of the owners of surface had either the resources or the inclination to incur the risks necessary for the working of mines of so great importance.

Thus, according to the facts of the case, as they appear in the record, the Government of Canada, in issuing the letters-patent of 18th September, 1846, seem not only not to have injuriously affected the interests of the surface-proprietors, but to have acted for the interest of all.

I think it may not be out of place to notice also that Sir L. H. Lafontaine, and the Hon. MM. Aylwin and Morin, who, at this period occupied the foremost rank among the jurisconsults of this country, contributed by their opinion to the issue of these letters-patent.

Another fact not without importance is, that over thirty years have elapsed without any complaint being made on the part of the *censitaires;* that of Messrs. O'Farrell and Venner, having been settled in a friendly manner, and it is difficult to understand what interest the plaintiff can have in asking for the annulling of a title granted by the Crown itself so many years ago.

I think, for these reasons, that the conclusions of the plaintiff should not be granted.

JUDGMENT OF THE SUPERIOR COURT.

CANADA,
PROVINCE OF QUEBEC,
District of Quebec.

IN THE SUPERIOR COURT.

The 22nd day of June, one thousand eight hundred and eighty-three.

PRESENT:

THE HONORABLE MR. JUSTICE CARON.

THE HONORABLE LOUIS ONÉSIME LORANGER,
Attorney General of this Province, for and on behalf of Our Sovereign Lady the Queen.

PLAINTIFF;

vs

THE DELÉRY GOLD MINING COMPANY, a body politic and corporate constituted under the provisions of an Act of the Parliament of the Province of Canada, passed in the twenty-seventh and twenty-eighth years of Our Reign, intituled "An Act to authorize the granting of Charters of Incorporation to Manufacturing, Mining and other Companies," having its principal place of business in the City of Quebec; The Canada Gold Company (limited), a body politic and corporate, duly incorporated under the provisions of the Companies' Acts of 1862 and 1863 as a limited company, registered in London, having its principal place of business in the Parish of St. François, in the District of Beauce; Dame Catherine Charlotte Eliza Couillard, widow of the late Honorable Alexandre René Chaussegros de Léry; Dame Catherine Louise Josephte Chaussegros de Léry, wife separated as to property by marriage contract of Richard Alleyn, Esquire, Advocate, and the said Richard Alleyn, mis en cause, for the purpose of authorizing and assisting his said wife; Corinne Marie Eliza Chaussegros de Léry, Spinster; George Auguste Fraser Chaussegros de Léry, Louis Charles Alexandre Chaussegros de Léry, all of the City of Quebec; and William Henri Bronage Chaussegros de Léry, of the Parish of St. François, in the District of Beauce,

DEFENDANTS.

The Honorable Joseph Alfred Mousseau substituted to the said Honorable Louis Onésime Loranger, prosecuting for and on behalf of Our Sovereign Lady the Queen.

The Court having examined the proceedings and proof of record, and having heard the parties by their respective Counsel on the merits;

Considering that the Attorney General of this Province asks for the nullification of the letters-patent granted by the Government of the Province of Canada, on the 18th day of September, 1846, to Dame Marie Josephte Fraser, Charles Joseph Chaussegros DeLery and Alexander René Chaussegros DeLery, for the working of the mines of gold and other precious metals in the seigniory of Rigaud-Vaudreuil, because, as he thus alleges in this cause, these letters-patent had been obtained by means of misrepresentation and granted in error, seeing that the mines of gold and other precious metals in this country belonged at the time to the owners of the soil and not to the Crown, and that the Government of the Province of Canada had no authority to allow the issuing of letters-patent of this nature, and besides that the conditions contained in these letters-patent have not been fulfilled;

Considering that it appears by the letters-patent themselves that the mis-representations mentioned in the said information have not been made, and that it is therein specially said that the seigniors DeLery had only represented to the Government that they were proprietors of the fief and seigniory of Rigaud-Vaudreuil, and that they thought there were gold mines therein;

Considering that it is established by the record, that no default has been made as respects the fulfilment of any of the essential conditions of the grant;

Considering that at the time of the cession of this country to the Crown of Great Britain, the Kings of France had *de facto* exercised the right of conceding mining rights for gold, at their good pleasure, and that when the letters-patent in question were granted, the Queen of England possessed similar powers;

Considering that the defendants have established the essential obligations of these pleas, which are well founded in law;

Considering that the reasons assigned by the said information have not been established in the present cause;

Doth maintain the pleas of the defendants and doth dismiss the information of the Attorney General of this Province, and doth further declare that the defendants would, in like case, against another party than the Crown, be entitled to their cost of suit.

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